

AMENDED IN ASSEMBLY MARCH 14, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 361

Introduced by Assembly Member Huffman
(Principal coauthor: Assembly Member Blumenfield)

February 14, 2011

~~An act to amend Section 25600 of the Corporations Code, relating to corporations. An act to add Part 13 (commencing with Section 14600) to Division 3 of Title 1 of the Corporations Code, relating to benefit corporations.~~

LEGISLATIVE COUNSEL'S DIGEST

AB 361, as amended, Huffman. ~~Department of Corporations. Benefit corporations.~~

Existing law, the General Corporation Law, authorizes and regulates the formation and governance of general corporations. The Nonprofit Corporation Law authorizes the formation and governance of nonprofit public benefit corporations, nonprofit mutual benefit corporations, and nonprofit religious corporations, and specifies the respective purposes for which those corporations may lawfully be formed. Existing law specifies the duties of corporate directors and the rights of shareholders. Existing law does not provide for the formation and governance of benefit corporations.

This bill would authorize and regulate the formation and governance of a new form of corporate entity known as a benefit corporation. The bill would also permit an existing general corporation to become a benefit corporation by amendment to its articles of incorporation, as specified, adopted by at least a minimum status vote, as defined, and

would permit a corporation to become a benefit corporation through a merger, as specified.

This bill would define “benefit corporation” to mean a corporation that has been organized under the General Corporation Law and has elected to become subject to the provisions of the bill, as specified. The bill would provide that a benefit corporation may be formed for the purpose of creating a general public benefit, defined as a material positive impact on society and the environment, taken as a whole, as measured by a 3rd-party standard, as defined, that satisfies certain requirements. The bill would also provide that a benefit corporation may identify one or more specific public benefits, as defined, as an additional purpose of the corporation, including, without limitation, providing low-income or underserved individuals or communities with beneficial products or services, promoting economic opportunity for individuals or communities beyond the creation of jobs in the ordinary course of business, preserving the environment, and improving human health.

This bill would require directors to consider the impacts of any action or proposed action upon specified considerations, including, among others, the shareholders and employees, and of customers who are beneficiaries of the general or specific public benefit purposes, and the environment, and would allow directors to consider the impacts of those actions on, among other things, the resources, intent, and conduct of any person seeking to acquire control of the benefit corporation.

This bill would require a benefit corporation to designate a benefit director, as defined, and would authorize a benefit corporation to designate a benefit officer, as defined. The bill would require the benefit officer, or, in the absence of a benefit officer, the benefit director, to prepare a specified statement relating to the public benefit purposes of the corporation. The bill would require the benefit corporation to prepare an annual benefit report to include, among other things, a description of the ways in which the benefit corporation pursued a general public benefit and any specific public benefit and the extent to which those benefits were created, and would require the benefit corporation to file with the Secretary of State a copy of the benefit report together with a filing fee in a specified amount to cover the reasonable regulatory costs associated with maintaining those filings.

This bill would include provisions governing the fiduciary duty and liability of an officer or director of a benefit corporation. The bill would provide that the duties of a director or officer, and the general and any

specific public benefit purpose of a benefit corporation, may be enforced only in a benefit enforcement proceeding, as defined, that would be permitted to be commenced or maintained only as specified.

~~Existing law establishes the Department of Corporations in the Business, Transportation and Housing Agency and makes the Commissioner of Corporations the chief officer of the department.~~

~~This bill would make a nonsubstantive, technical change to that provision.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~-yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 *SECTION 1. Part 13 (commencing with Section 14600) is*
2 *added to Division 3 of Title 1 of the Corporations Code, to read:*

3
4 *PART 13. BENEFIT CORPORATIONS*

5
6 *CHAPTER 1. PRELIMINARY PROVISIONS*

7
8 14600. (a) *This part shall be applicable to all benefit*
9 *corporations.*

10 (b) *The existence of a provision of this part shall not of itself*
11 *create any implication that a contrary or different rule of law is*
12 *or would be applicable to a business corporation that is not a*
13 *benefit corporation. This part shall not affect any statute or rule*
14 *of law that is or would be applicable to a corporation that is not*
15 *a benefit corporation.*

16 (c) *The provisions of the General Corporation Law (Division*
17 *1 (commencing with Section 100)) shall apply to benefit*
18 *corporations, except where those provisions are in conflict with*
19 *or inconsistent with the provisions of this part.*

20 14601. *As used in this part:*

21 (a) *“Benefit corporation” means a corporation organized under*
22 *the General Corporation Law that has elected to become subject*
23 *to this part and whose status as a benefit corporation has not been*
24 *terminated as provided in this part.*

25 (b) *“Benefit director” means the director designated as the*
26 *benefit director of a benefit corporation as provided in subdivision*
27 *(a) of Section 14621.*

1 (c) “Benefit enforcement proceeding” means a claim or action
2 brought directly by a benefit corporation, or derivatively on behalf
3 of a benefit corporation, against a director or officer for either of
4 the following:

5 (1) Failure to pursue the general public benefit purpose of the
6 benefit corporation or any specific public benefit purpose set forth
7 in its articles.

8 (2) Violation of a duty or standard of conduct imposed on a
9 director pursuant to this part.

10 (d) “Benefit officer” means the officer of a benefit corporation,
11 if any, designated as the benefit officer as provided in Section
12 14623.

13 (e) “General public benefit” means a material positive impact
14 on society and the environment, taken as a whole, as measured by
15 a third-party standard, from the business and operations of a
16 benefit corporation.

17 (f) “Independent” means that a person has no material
18 relationship with a benefit corporation or any of its subsidiaries.
19 Serving as a benefit director or benefit officer does not, in itself,
20 make a person not independent. A material relationship between
21 a person and a benefit corporation or any of its subsidiaries shall
22 be conclusively presumed to exist if any of the following apply:

23 (1) The person is, or has been within the last three years, an
24 employee of the benefit corporation or any of its subsidiaries, other
25 than as a benefit officer.

26 (2) An immediate family member of the person is, or has been
27 within the last three years, an executive officer, other than a benefit
28 officer, of the benefit corporation or any of its subsidiaries.

29 (3) The person, or an association of which the person is a
30 director, officer, or other manager or in which the person owns
31 beneficially or of record 5 percent or more of the outstanding
32 equity interests, owns beneficially or of record 5 percent or more
33 of the outstanding shares of the benefit corporation.

34 (g) Subject to subdivision (k), “minimum status vote” means
35 that, in addition to any other approval or vote required by Division
36 1 (commencing with Section 100) or the articles of incorporation,
37 both of the following shall apply:

38 (1) The shareholders of every class or series shall be entitled
39 to vote on the corporate action regardless of any limitation stated
40 in the articles or bylaws on the voting rights of any class or series.

1 (2) *The corporate action shall be approved by the vote of the*
2 *shareholders of each class or series entitled to cast at least*
3 *two-thirds of the votes that all shareholders of the class or series*
4 *are entitled to cast on that action.*

5 (h) *“Specific public benefit” includes all of the following:*

6 (1) *Providing low-income or underserved individuals or*
7 *communities with beneficial products or services.*

8 (2) *Promoting economic opportunity for individuals or*
9 *communities beyond the creation of jobs in the ordinary course of*
10 *business.*

11 (3) *Preserving the environment.*

12 (4) *Improving human health.*

13 (5) *Promoting the arts, sciences, or advancement of knowledge.*

14 (6) *Increasing the flow of capital to entities with a public benefit*
15 *purpose.*

16 (7) *The accomplishment of any other particular benefit for*
17 *society or the environment.*

18 (i) *Subject to subdivision (k), “subsidiary” of a person means*
19 *an association in which the person owns beneficially or of record*
20 *50 percent or more of the outstanding equity interests.*

21 (j) *“Third-party standard” means a standard for defining,*
22 *reporting, and assessing overall corporate social and*
23 *environmental performance to which both of the following apply:*

24 (1) *The standard is a comprehensive assessment of the impact*
25 *of the business and the business’s operations upon the*
26 *consideration listed in Section 14620.*

27 (2) *The standard is developed by an organization that is*
28 *independent of the benefit corporation and that satisfies both of*
29 *the following requirements:*

30 (A) *Not more than one-third of the members of the governing*
31 *body of the organization are representatives of either of the*
32 *following:*

33 (i) *An association of businesses operating in a specific industry,*
34 *the performance of whose members is measured by the standard.*

35 (ii) *Businesses whose performance is measured by the standard.*

36 (B) *The organization is not materially financed by an association*
37 *or business described in subparagraph (A).*

38 (3) *The standard is developed by a person that does both of the*
39 *following:*

1 (A) *Accesses necessary and appropriate expertise to assess*
2 *overall corporate social and environmental performance.*

3 (B) *Uses a balanced multistakeholder approach, including a*
4 *public comment period of at least 30 days to develop the standard.*

5 (4) *All of the following information regarding the standard is*
6 *publicly available:*

7 (A) *The criteria considered when measuring the overall social*
8 *and environmental performance of a business.*

9 (B) *The relative weightings assigned to the criteria described*
10 *in subparagraph (A).*

11 (C) *The identity of the directors, officers, any material owners,*
12 *and the governing body of the organization that developed, and*
13 *controls revisions to, the standard.*

14 (D) *The process by which revisions to the standard and changes*
15 *to the membership of the governing body described in*
16 *subparagraph (C) are made.*

17 (E) *An accounting of the sources of financial support for the*
18 *organization, with sufficient detail to disclose any relationships*
19 *that could reasonably be considered to present a potential conflict*
20 *of interest.*

21 (k) *For purposes of the definitions of “independent” in*
22 *subdivision (f) and “subsidiary” in subdivision (i), a percentage*
23 *of ownership in an association shall be calculated as if all*
24 *outstanding rights to acquire equity interests in the association*
25 *had been exercised.*

26 14602. *A benefit corporation shall be formed in accordance*
27 *with Chapter 2 (commencing with Section 200) of Division 1 except*
28 *that the articles shall also state that the corporation is a benefit*
29 *corporation.*

30 14603. (a) *A general corporation may become a benefit*
31 *corporation under this part by amending the corporation’s articles*
32 *so that the articles contain a statement that the corporation is a*
33 *benefit corporation. The amendment shall not be effective unless*
34 *it is adopted by at least the minimum status vote.*

35 (b) *If a corporation that is not a benefit corporation is a party*
36 *to a merger reorganization or is the acquired corporation in an*
37 *exchange reorganization, and the surviving corporation in the*
38 *reorganization is to be a benefit corporation, then the*
39 *reorganization shall not be effective unless the reorganization is*
40 *adopted by the corporation by at least the minimum status vote.*

1 14604. (a) A benefit corporation may terminate its status as
2 a benefit corporation and cease to be subject to this part by
3 amending the corporation's articles to delete the provision required
4 by Section 14602. The amendment shall not be effective unless the
5 amendment is adopted by at least the minimum status vote.

6 (b) If a reorganization would have the effect of terminating the
7 status of a general corporation as a benefit corporation, the
8 reorganization shall not be effective unless the reorganization is
9 adopted by at least the minimum status vote.

10
11 CHAPTER 2. CORPORATE PURPOSES
12

13 14610. (a) A benefit corporation shall have the purpose of
14 creating a general public benefit. This purpose is in addition to,
15 and may be a limitation on, the corporation's purpose under
16 Section 206 and any specific purpose set forth in its articles in
17 accordance with subdivision (b).

18 (b) The articles of a benefit corporation may identify one or
19 more specific public benefits that shall be the purpose or purposes
20 of the benefit corporation to create in addition to its purposes
21 under Section 206 and subdivision (a). The identification of a
22 specific public benefit under this subdivision does not limit the
23 obligation of a benefit corporation to create any other general
24 public benefit.

25 (c) The creation of general and specific public benefit as
26 provided in subdivisions (a) and (b) shall be deemed to be in the
27 best interests of the benefit corporation.

28 (d) A benefit corporation may amend, its articles to add, amend,
29 or delete the identification of a specific public benefit that shall
30 be the purpose of the benefit corporation to create. The amendment
31 shall not be effective unless the amendment is adopted by at least
32 the minimum status vote.

33
34 CHAPTER 3. ACCOUNTABILITY
35

36 14620. (a) In discharging their respective duties, and in
37 considering the best interests of the benefit corporation, the board
38 of directors, committees of the board, and individual directors of
39 a benefit corporation shall consider the impacts of any action or
40 proposed action upon all of the following:

1 (1) *The shareholders of the benefit corporation.*

2 (2) *The employees and workforce of the benefit corporation and*
3 *its subsidiaries and suppliers.*

4 (3) *The interests of customers of the benefit corporation as*
5 *beneficiaries of the general or specific public benefit purposes of*
6 *the benefit corporation.*

7 (4) *Community and societal considerations, including those of*
8 *any community in which offices or facilities of the benefit*
9 *corporation or its subsidiaries or suppliers are located.*

10 (5) *The local and global environment.*

11 (6) *The short-term and long-term interests of the benefit*
12 *corporation, including benefits that may accrue to the benefit*
13 *corporation from its long-term plans and the possibility that these*
14 *interests may be best served by retaining control of the benefit*
15 *corporation rather than selling or transferring control to another*
16 *entity.*

17 (7) *The ability of the benefit corporation to accomplish its*
18 *general, and any specific, public benefit purpose.*

19 (b) *In discharging their respective duties, the persons described*
20 *in subdivision (a) may consider the impacts of any action or*
21 *proposed action upon any of the following:*

22 (1) *The resources, intent, and conduct, including past, stated,*
23 *and potential conduct, of any person seeking to acquire control*
24 *of the corporation.*

25 (2) *Any other pertinent factors or the interests of any other*
26 *group that any of the persons described in subdivision (a) deems*
27 *appropriate.*

28 (c) *In discharging their respective duties, the persons described*
29 *in subdivision (a) shall not be required to give priority to the*
30 *interests of any particular person or group referred to in*
31 *subdivision (a) or (b) over the interests of any other person or*
32 *group unless the benefit corporation has stated its intention to*
33 *give priority to interests related to a specific public benefit purpose*
34 *identified in the articles.*

35 (d) *In discharging its consideration of impacts as provided in*
36 *subdivision (a), the board of directors, committees of the board,*
37 *and individual directors may rely exclusively on their personal or*
38 *collective understanding of those impacts or they may additionally*
39 *rely on the information, opinions, reports, or statements specified*

1 *in subdivision (b) of Section 309. The consideration of those*
2 *impacts shall not constitute a violation of Section 309.*

3 *(e) A director shall have no liability for any of the following:*

4 *(1) Any action taken as a director, if the director performed the*
5 *duties of his or her office in compliance with Section 309 and this*
6 *section.*

7 *(2) Any failure of the benefit corporation to create a general or*
8 *specific public benefit.*

9 *(f) A director shall not have a fiduciary duty to a person that is*
10 *a beneficiary of the general or specific public benefit purposes of*
11 *a benefit corporation arising from the status of the person as a*
12 *beneficiary.*

13 *14621. (a) The board of directors of a benefit corporation*
14 *shall include one director who shall be designated the “benefit*
15 *director” and shall have, in addition to all of the powers, duties,*
16 *rights, and immunities of the other directors of the benefit*
17 *corporation, the powers, duties, rights, and immunities provided*
18 *in this chapter.*

19 *(b) The benefit director shall be elected, and may be removed,*
20 *in the manner provided by Chapter 3 (commencing with Section*
21 *300) of Division 1, and shall be an individual who is independent.*
22 *The benefit director may serve as the benefit officer while also*
23 *serving as the benefit director. The articles or bylaws of a benefit*
24 *corporation may prescribe additional qualifications of the benefit*
25 *director not inconsistent with this subdivision.*

26 *(c) (1) The benefit director shall prepare, and the benefit*
27 *corporation shall include in its annual benefit report to*
28 *shareholders required by Section 14630, a statement indicating*
29 *whether, in the opinion of the benefit director, the benefit*
30 *corporation acted in accordance with its general, and any specific,*
31 *public benefit purpose in all material respects during the period*
32 *covered by the report and whether the directors and officers*
33 *complied with Sections 14620 and 14622, respectively.*

34 *(2) If, in the opinion of the benefit director, the benefit*
35 *corporation or its directors or officers failed to act in accordance*
36 *with the standards described in paragraph (1), then the statement*
37 *of the benefit director shall include a description of the ways in*
38 *which the benefit corporation or its directors or officers failed to*
39 *act in accordance with those standards.*

1 (d) *The acts of an individual in the capacity of a benefit director*
2 *shall constitute for all purposes acts of that individual in the*
3 *capacity of a director of the benefit corporation.*

4 (e) *If a shareholders' agreement provides that the powers and*
5 *duties of the board of directors shall be exercised or performed*
6 *by the shareholders, then the bylaws of the benefit corporation*
7 *shall provide that one of the shareholders who performs the duties*
8 *of a director shall have the powers, duties, rights, and immunities*
9 *of a benefit director.*

10 (f) *Regardless of whether the bylaws of a benefit corporation*
11 *include a provision eliminating or limiting the personal liability*
12 *of directors as authorized by paragraph (10) of subdivision (a) of*
13 *Section 204, a benefit director shall not be personally liable for*
14 *any act or omission in the capacity of a benefit director unless the*
15 *act or omission constitutes self-dealing, willful misconduct, or a*
16 *knowing violation of law.*

17 14622. (a) *Each officer of a benefit corporation shall consider*
18 *the interests and factors described in Section 14620 in the manner*
19 *provided in that section when either of the following applies:*

20 (1) *The officer has discretion to act with respect to a matter.*

21 (2) *It reasonably appears to the officer that the matter may have*
22 *a material effect on any of the following:*

23 (A) *The creation of a general or specific public benefit by the*
24 *benefit corporation.*

25 (B) *Any of the interests or factors referred to in subdivision (a)*
26 *of Section 14620.*

27 (b) *The consideration by an officer of interests and factors in*
28 *the manner described in subdivision (a) shall not constitute a*
29 *violation of the duties of the officer.*

30 (c) *An officer shall not be personally liable for monetary*
31 *damages for either of the following:*

32 (1) *Any action taken as an officer if the officer performed the*
33 *duties of the position in compliance with this section.*

34 (2) *Any failure of the benefit corporation to create a general or*
35 *specific public benefit.*

36 (d) *An officer shall not have a fiduciary duty to a person that*
37 *is a beneficiary of the general or specific public benefit purposes*
38 *of a benefit corporation arising from the status of the person as a*
39 *beneficiary.*

1 14623. (a) A benefit corporation may designate an officer as
2 the “benefit officer” who shall have the authority to perform, and
3 shall perform, the duties in the management of the benefit
4 corporation relating to the purpose of the corporation to create a
5 general or specific public benefit as may be provided by the bylaws
6 or, in the absence of controlling provisions in the bylaws, as may
7 be determined by resolutions or orders of the board of directors.

8 (b) If a benefit corporation has a benefit officer, the duties of
9 the benefit officer shall include preparing the benefit report
10 required by Section 14630.

11 14624. (a) The duties of a director or officer under this
12 chapter, and the general and any specific public benefit purpose
13 of a benefit corporation, may be enforced only in a benefit
14 enforcement proceeding. No person may bring an action or assert
15 a claim against a benefit corporation or its directors or officers
16 with respect to the duties of directors and officers under this
17 chapter or with respect to the general or any specific public benefit
18 purpose of the benefit corporation except in a benefit enforcement
19 proceeding.

20 (b) A benefit enforcement proceeding may be commenced or
21 maintained only as follows:

22 (1) Directly by the benefit corporation.

23 (2) Derivatively by any of the following:

24 (A) A shareholder.

25 (B) A director.

26 (C) A person or group of persons that owns beneficially or of
27 record 5 percent or more of the equity interests in an association
28 of which the benefit corporation is a subsidiary.

29 (D) Other persons as have been specified in the articles or
30 bylaws of the benefit corporation.

31
32 CHAPTER 4. TRANSPARENCY
33

34 14630. (a) A benefit corporation shall deliver to each
35 shareholder an annual benefit report including all of the following:

36 (1) A narrative description of all of the following:

37 (A) The ways in which the benefit corporation pursued a general
38 public benefit during the applicable year and the extent to which
39 that general public benefit was created.

1 (B) *The ways in which the benefit corporation pursued any*
2 *specific public benefit that the articles state it is the purpose of*
3 *the benefit corporation to create and the extent to which that*
4 *specific public benefit was created.*

5 (C) *Any circumstances that have hindered the creation by the*
6 *benefit corporation of a general or specific public benefit.*

7 (2) *An assessment of the overall social and environmental*
8 *performance of the benefit corporation, prepared in accordance*
9 *with a third-party standard applied consistently with any*
10 *application of that standard in prior benefit reports or*
11 *accompanied by an explanation of the reasons for any inconsistent*
12 *application.*

13 (3) *The name of the benefit director and the benefit officer, if*
14 *any, and the address to which correspondence to each of them*
15 *may be directed.*

16 (4) *The compensation paid by the benefit corporation during*
17 *the applicable year to each benefit director.*

18 (5) *The name of each person that owns 5 percent or more of the*
19 *outstanding shares of the benefit corporation, either beneficially,*
20 *to the extent known to the benefit corporation without independent*
21 *investigation, or of record.*

22 (6) *The statement of the benefit director described in subdivision*
23 *(c) of Section 14621.*

24 (7) *A statement of any connection between the entity that*
25 *established the third-party standard, or its directors, officers, or*
26 *material owners, and the benefit corporation, or its directors,*
27 *officers, and material owners, including any financial or*
28 *governance relationship that might materially affect the credibility*
29 *of the objective assessment of the third-party standard.*

30 (b) *The benefit report shall be sent annually to each shareholder*
31 *within 120 days following the end of the fiscal year of the benefit*
32 *corporation or at the same time that the benefit corporation*
33 *delivers any other annual report to its shareholders.*

34 (c) *A benefit corporation shall post its most recent benefit report*
35 *on the public portion of its Internet Web site, if any, except that*
36 *the compensation paid to directors and any financial or proprietary*
37 *information included in the benefit report may be omitted from the*
38 *benefit report as posted on the Internet Web site.*

39 (d) *Concurrently with the delivery of the benefit report to*
40 *shareholders pursuant to subdivision (b), the benefit corporation*

1 *shall deliver a copy of the benefit report to the Secretary of State*
2 *for filing, except that the compensation paid to directors and any*
3 *financial or proprietary information included in the benefit report*
4 *may be omitted from the benefit report as filed in accordance with*
5 *this subdivision. The Secretary of State shall charge a fee not to*
6 *exceed seventy dollars (\$70) for filing a benefit report to cover*
7 *the reasonable regulatory costs associated with maintaining those*
8 *filings.*

9 ~~SECTION 1. Section 25600 of the Corporations Code is~~
10 ~~amended to read:~~

11 ~~25600. There is in the state government, in the Business,~~
12 ~~Transportation and Housing Agency a Department of Corporations,~~
13 ~~which shall administer the provisions of this division. The chief~~
14 ~~officer of the Department of Corporations is the Commissioner of~~
15 ~~Corporations. The commissioner shall be appointed by the~~
16 ~~Governor and shall hold office at the pleasure of the Governor.~~
17 ~~He or she shall receive an annual salary as fixed in the Government~~
18 ~~Code. Within 15 days from the time of his or her appointment, the~~
19 ~~commissioner shall take and subscribe to the constitutional oath~~
20 ~~of office and file it in the office of the Secretary of State.~~

21 ~~Whenever the term "Division of Corporations" is used in the~~
22 ~~law, it shall mean the Department of Corporations.~~